TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. RELATORS ARE ENTITLED TO A WRIT OF MANDAMUS AND/OR PROHIBITION, COMPELLING RESPONDENT TO VACATE HER ORDER OF NOVEMBER 27, 2002, AND PROHIBITING RESPONDENT FROM TRANSFERRING ANY PART OF THE CAUSE OF ACTION, BECAUSE SHE FAILED TO RESOLVE THE CONTINGENT QUESTION OF VENUE UNDER MISSOURI'S LAW OF JOINDER, WHICH DOES NOT REQUIRE A SEPARATE ANALYSIS OF VENUE AS TO JOINT TORTFEASORS WHEN VENUE IS CLEARLY PROPER IN THE CITY OF ST. LOUIS UNDER § 355.176.4 AS TO JOINT TORTFEASOR BJC, IN THAT SHE IGNORED HER OWN FINDINGS OF ADEQUATELY PLEADED JOINT LIABILITY, DETERMINED VENUE SEPARATELY AS TO EACH DEFENDANT, ORDERED SEPARATE TRIALS FOR DEFENDANTS BJC AND MBMC, AND IMPROPERLY TRANSFERRED THE CASE AGAINST MBMC TO ST. LOUIS COUNTY.

A. <u>The Narrow Issue Presented Before This Court</u>.

While Respondent, through MBMC and BJC, strongly disagrees with Relators' venue analysis, she stipulates to certain matters set forth by Relators. For example, at page 20 of their brief they stipulate that "Relators are correct that discovery and trial of this wrongful death action in the separate venues is contrary to Missouri law . . ." Thus, on this point the parties are in agreement that separate actions cannot be maintained.

Respondent also states her position in this proceeding succinctly when she states: "Here the exclusive venue within which Missouri Baptist can be sued, St. Louis County, . . is also a proper venue under § 355.176.4 for BJC Health Systems." (Respondent's brief, at 17). Similarly, they assert: "In the case at bar, the only venue proper for all defendants and improper for none is St. Louis County." (Respondent's brief, at 14).

Glaringly absent from the nonprofit corporations' brief is any discussion of joinder as it relates to venue. The nonprofit venue statute, far from being a traditional venue tool for the convenient, orderly resolution of disputes, is championed by defendants as a "trump card," (p.13), a "restrictive" measure (p.16), and in fact an "exclusive venue" provision (p.16). It's as if nonprofits banded together to lobby the Legislature for an exclusive venue club, capable of denying access to all but the most worthy.

Desperately avoiding editorial comments, Relators would simply suggest that the Legislature did not intend absurd results. The Legislature did not abolish medical malpractice as a cause of action; the doctrine remains alive and well. A subpart of the nonprofit statute – which the Legislature attempted to repeal – is advanced by these Defendants as superceding all statutes and rules on joinder, all statutes applicable to for-profit corporations and individuals, and all notions of fair play and justice.

The issue before the Court, again, is simply this: When two nonprofit corporations are properly joined, is venue appropriate in any one of the six (two defendants times three choices in § 355.176.4, RSMo. 1996) locations enumerated by the statute?

B. Venue is Appropriate as to MBMC Because it is Clearly Appropriate as to BJC.

Without saying it expressly, the nonprofit Defendants contend they have venue rights far superior to those of for-profit defendants, such as the defendants in *State ex rel. Webb v. Satz*, 561 S.W.2d 113 (Mo. banc 1978). There, the defendants made exactly the same argument made by BJC and MBMC. That is, they argued that the plaintiff was restricted to that venue that fit perfectly for all defendants. *Satz*, 561 S.W.2d at 114. This Court refused to read the corporate venue statute, § 508.040, RSMo. 1939, in such a restrictive manner.

Yet the nonprofit Defendants argue that, because § 355.176.4 uses the word "only," suddenly plaintiffs must search for that one location where venue is satisfied as to each, individual nonprofit. Further, Defendants dismiss Relators' argument (first made by Respondent Judge Neill herself) that there may not be any location that is correct for each defendant. The nonprofit Defendants accuse Relators of seeking an "advisory opinion" since here St. Louis County supplies the magic venue confluence for BJC and MBMC. If there is one, two or three potential venues where two nonprofits are joined, how could this Court ignore the possibility – really, the probability – that the number zero will eventually come up under Defendants' venue equation?

The fundamental flaw in Defendants' analysis is that it fails to consider the importance of proper joinder. They also rely on this Court's decision in *State ex rel. SSM Health Care v. Neill*, 78 S.W.3d 140 (Mo. banc 2002), for extreme propositions that aren't there. As this Court noted at the beginning of its opinion: "This case presents the narrow issue whether the special nonprofit corporate venue statute, section 355.176.4, or the general venue statute, section 508.010(2), governs when a nonprofit corporation and an individual are sued together." *State ex rel. SSM v. Neill*, 78 S.W.3d at 140-41 (emphasis added).

Here, no one argues that § 355.176.4 does not apply. The issue before the Court now was simply not addressed in *State ex rel. SSM v. Neill.*

Nor was it before the Court of Appeals in the case of *State ex rel. BJC Health Systems v. Neill*, 86 S.W.3d 138, 141 (Mo. App. E.D. 2002), since there the court held that no claim was stated as to BJC. Because no claim was stated, and because Missouri Baptist could only be sued in St. Louis County, venue in St. Louis City was improper.

The nonprofit corporations, describing this Court's opinion in *State ex rel. SSM v. Neill*, assert two critical holdings. First, they say this Court ruled that § 355.176.4 applies when a nonprofit is joined with another defendant. Second, they claim that the Court's opinion makes clear that the words "shall" and "only" bespeak an intention to restrict venue to one of the three locations in all cases.

Assuming the nonprofits correctly summarize this Court's opinion, what Defendants have not done is carry the case summary over to this case, in which two nonprofit corporations are joined. Instead, they argue doggedly that only one venue is plausible in this case, i.e., they argue that the principal place of BJC in St. Louis City should be ignored.

The words "shall" and "only" are not all that unique in Missouri legislation. In fact, the corporate venue statute, § 508.040, begins, "Suits against corporations shall be commenced . . ." (emphasis added). For want of an "only," MBMC and BJC claim the corporate venue statute bears no relation to the nonprofit venue statute.

If the argument of Defendants is accepted in this case, the consequences are obvious. Surely the case of "no perfect fit for all defendants" postulated by Judge Neill will arrive at this Court, and just as surely trial judges in such cases will split causes of action as Respondent did

here. Any suggestion that by raising this issue Relators are seeking an "advisory opinion" misses the mark. Relators' entire point in this case is that joinder and venue must be considered together. Bear in mind that this Court in *Satz* did not hold that venue as to one is venue as to all because § 508.040 lacks the word "only." Unlike in *State ex rel. SSM v. Neill*, in *Satz* there was no dispute as to the applicable venue statute. Only corporations were defendants, so § 508.040 applied. *Satz*, 561 S.W.2d at 113-14.

The issue the Court decided in *Satz* was simply a matter of interpretation, i.e., did the statute mean that venue had to be satisfied as to all defendants, or was venue as to one venue as to all. The Court held it was the latter:

> Accordingly, the meaning [of the words "where such corporations"] is that any county where one or more of the corporations has an office or agent of the specified type is a county where an action against corporations can be commenced.

(*Id*. at 115).

In *Satz*, of the six defendants named (in two separate cases) only two had business offices in the venued counties, and the causes of action did not accrue where the plaintiffs filed suit. *Id*. at 113-14. Thus, the other four defendants were in no different position that is Missouri Baptist in this case.

In *Satz* the fact that four of six of the defendants did not have any office in the venue chosen was irrelevant to the proper interpretation of the statute. So too in this case, BJC's presence in the City makes MBMC's non-presence of no moment. If BJC is properly joined as a defendant with MBMC, which no one challenges in this proceeding, venue is proper where

BJC's principal office is maintained. Nothing in *State ex rel. SSM v. Neill* suggests to the contrary. Again, the sole, narrow issue in that case was which venue statute controlled the case.

Here, St. Louis City is the home of BJC's principal place of business. Thus, under § 355.176.4(1), venue in the City is proper. And, unlike in *State ex rel. BJC v. Neill*, the Eastern District Court of Appeals case, Plaintiffs have stated a cognizable claim of negligence against BJC. Thus, venue is proper in St. Louis City.

Respondent Judge Neill should be directed to rescind that part of her Order of November 27, 2002 transferring the case against Missouri Baptist to St. Louis County.

II. RELATORS ARE ENTITLED TO A WRIT OF MANDAMUS AND/OR PROHIBITION, COMPELLING RESPONDENT TO VACATE HER ORDER OF NOVEMBER 27, 2002, AND PROHIBITING RESPONDENT FROM TRANSFERRING PART OF THE CAUSE OF ACTION, BECAUSE A WRONGFUL DEATH CLAIM UNDER MISSOURI LAW IS A SINGLE, INDIVISIBLE CLAIM THAT MAY NOT BE SPLIT AND TRIED PIECEMEAL, IN THAT RESPONDENT ERRONEOUSLY ORDERED SEPARATE TRIALS AS TO TWO, JOINTLY LIABLE DEFENDANTS IN A WRONGFUL DEATH CASE AND IMPROPERLY TRANSFERRED THE CLAIMS AGAINST ONE SUCH JOINTLY LIABLE DEFENDANT.

Because Respondent concedes that the cause of action below should not have been split by the trial judge, Relators will not belabor the record with additional briefing on this point.

CONCLUSION

Relators request this Court to issue its Order in Mandamus or Prohibition directing Respondent to rescind that part of her Order of November 27, 2002 that transferred the case against Missouri Baptist to St. Louis County.

Respectfully submitted,

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Certificate of Service

I hereby certify two copies of the foregoing were served upon the parties hereto by hand delivery on this 30th day of June, 2003, to:

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_____

Rule No. 84.06(b) and (g) Certificate

I hereby certify that this Brief complies with the limitations contained in Rule No. 84.06(b) and that this brief contains 1712 words according to the word count of Corel Word Perfect Version 9.

I hereby certify that this disk has been checked for viruses in compliance with Rule No. 84.06(g) and that it is virus free.

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